

The Meaning of Consent

Vera Bergelson*

It is often said that consent is “morally transformative,” even magical: it transforms what otherwise would be illegal conduct into conduct that is entirely legal.¹ As the famous maxim goes: *volenti non fit injuria*—a person is not wronged by that to which he consents.² But how literally should we read this maxim? Does consent of one person always have the power to change the moral and legal character of another person’s actions? It certainly precludes a number of serious offenses. Quoting Heidi Hurd, “consent turns a rape into love-making, a kidnapping into a Sunday drive, a battery into a football tackle, a theft into a gift, and a trespass into a dinner party.”³ This generalization, however, should be taken with a grain of salt: there are serious offenses (such as battery or homicide) that remain criminal regardless of the victim’s consent.

Numerous limitations curtail the magical powers of consent. At a minimum, legally valid consent must be rational and voluntary, that is, freely given and informed. Consent given under certain conditions (fraud *in factum* or duress) or by certain groups of people (e.g., children, mentally ill, severely intoxicated), in most instances, is deemed void.⁴

All these limitations have been in the center of the academic and public attention for a long time. When may consent be deemed voluntary; can it ever be deemed voluntary enough to play a normative role; who may be regarded a rational decision maker; what actions should be excluded from the protection of consent—these and other questions have been raised in the context of assisted suicide, experimental medical treatment, underage sex, sex with the mentally ill, nontraditional sexual practices (e.g., sadomasochistic encounters or erotic asphyxiation), consumption of drugs, dangerous competitions (e.g., drag racing), and so on.⁵

* Professor of Law, Robert E. Knowlton Scholar, Rutgers School of Law-Newark.

¹ See, e.g., Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 121, 124 (1996).

² Terence Ingman, *A History of the Defence of Volenti Non Fit Injuria*, 26 JURID. REV. 1, 4 (1981).

³ Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal That Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 BUFF. CRIM. L. REV. 503, 504 (2005).

⁴ Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 166–67 (1996).

⁵ See, e.g., THE ETHICS OF CONSENT: THEORY AND PRACTICE (Franklin G. Miller & Alan Wertheimer eds., 2010); ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS (2003); PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT (2004).

In view of these complicated and often politically charged discussions, it has become particularly important to clarify and define the basic terms. Specifically: What is *consent*? What does it mean to say that Jill consented to having sex with Jack? As we know, criminal law is largely driven by the goal of protecting people's autonomy. The state justifies employing the harshest and most intrusive powers against an individual by the overarching need to enforce the rights and obligations of all members of society. Consent involves changing the balance of those rights and corresponding obligations.⁶ By consenting to having sex with Jack, Jill temporarily waives her right to physical inviolability. She relieves Jack of his obligation not to cross the boundaries of her sexual autonomy, and in most instances, simultaneously relieves the state of its obligation to protect her from Jack's boundary-crossing conduct. Moreover, by consenting to having sex with Jack, Jill not only *relieves* the state of its obligation to protect Jill—Jill *demand*s that the state not intervene (e.g., by punishing Jack) in this consensual transaction because such intervention would violate both Jack's and Jill's autonomy.⁷

In short, consent is a crucial, game changing mechanism in a relationship between individuals as well as between an individual and the state. So, what exactly has to happen between Jack and Jill in order to make their intercourse consensual? Is it Jill's internal state of mind or her external expression of acquiescence that magically changes the moral and legal character of Jack's actions? Naturally, if it is the latter, we will need to determine what actions by Jill (passive non-resistance; non-verbal cooperation; or verbal approval) should suffice for granting Jack a valid license. However, before we reach that point, we have a more fundamental question to resolve: Should normative consent be based on the internal or external reality?

Those who believe in the former argue that consent means one's subjective state of mind, "attitudinal" consent. Heidi Hurd, for example, maintains that to consent is to intend another's act of crossing what otherwise would be a moral boundary.⁸ Larry Alexander is somewhat less restrictive: for him, to consent to certain conduct is not to *intend* it but rather to *waive an objection* to it.⁹ I tend to agree with the latter interpretation but, irrespective of this difference, both Hurd

⁶ JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 322–74 (1990).

⁷ Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 569 (2004).

In the presence of consent, invoking the criminal law is inappropriate not only because the conduct is harmless in the relevant sense—so that punishing the "offender" would violate his autonomy without vindicating the autonomy of the "victim"—but also because doing so would violate the autonomy of the "victim." The *victim*, in other words, has a *right to consent*. *Id.* (citation omitted).

⁸ Hurd, *supra* note 1, at 124.

⁹ Alexander, *supra* note 4, at 166. "One consents to an act when, acting with the capacity necessary for autonomous, responsible agency, one chooses to forego valid rights-based moral objections to the act." *Id.* at 172.

and Alexander focus on one's internal attitude towards the action of another. If Jill tacitly welcomes Jack's sexual advances, Jack is not guilty of committing sexual assault. He is not guilty of sexual assault regardless of Jill's external conduct.

This theory of consent is exemplified in *People v. Bink*.¹⁰ In that case, a young prison inmate complained to a correction officer that another inmate, Bink, had implicitly threatened him and forced him to perform certain sexual acts on Bink.¹¹ The new encounter was to take place the following morning. The complainant declined offers of physical protection but instead requested that the correction officers watch him closely the next day.¹² As the complainant later testified, "he wanted [the] defendant and himself to be caught 'in the act.'"¹³ Bink was convicted of forcible sodomy but his conviction was reversed on appeal. The appellate court did not deny that initially the complainant could have been acting under intimidation; however, during the observed encounter the complainant was driven by the desire to capture the defendant, and in that sense he "wanted to be assaulted,"¹⁴ and thus lacked the required attitudinal non-consent.

Another way to look at consent is called performative or expressive or communicative. For scholars like Nathan Brett or Stephen Schulhofer, normative consent implies explicit permission by words or conduct to another's act.¹⁵ In the stronger form of this viewpoint, explicit permission is a sufficient condition of (otherwise valid) consent. Internal thoughts and desires of the consent-giver are irrelevant. In a weaker, hybrid form, explicit permission is at least necessary for valid consent, albeit the subjective mental acquiescence of the consent-giver is also required.¹⁶

A classic example of the performative theory of consent is *People v. Burnham*.¹⁷ In that case, a severely beaten woman agreed, under the threat of further beating by her husband, to engage in sexual intercourse with strangers.¹⁸ Fearing her husband, she feigned willingness and desire.¹⁹ The husband was prosecuted and convicted of spousal rape but no charges were filed against the

¹⁰ 84 A.D.2d 607 (N.Y. App. Div. 1981).

¹¹ See *id.*

¹² *Id.* at 608.

¹³ *Id.*

¹⁴ Kimberly Kessler Ferzan, *Clarifying Consent: Peter Westen's 'The Logic of Consent'*, 25 LAW & PHIL. 193, 214 (2006).

¹⁵ Nathan Brett, *Sexual Offenses and Consent*, 11 CAN. J. L. & JURIS. 69, 69 (1998); Stephen J. Schulhofer, *Rape in the Twilight Zone: When Sex is Unwanted But Not Illegal*, 38 SUFFOLK U. L. REV. 415, 422 (2005)

¹⁶ Hurd, *supra* note 1, at 135.

¹⁷ 176 Cal. App. 3d 1134 (Ct. App. 1986).

¹⁸ See *id.* at 1142; WERTHEIMER, *supra* note 5, at 149.

¹⁹ See *Burnham*, 176 Cal. App. 3d at 1143; WERTHEIMER, *supra*, note 5, at 149.

victim's sex partners because they had no knowledge of the threats, and—for them—her expression of consent defeated the required element of non-consent.²⁰

So, which theory of consent reflects our moral sense more accurately? To test them further, let me suggest a few hypotheticals:

1. Polly is secretly in love with Mick and would like to have sex with him. At a party at Mick's home, she sneaks into his bedroom, and pretends to be completely drunken and asleep. Mick finds Polly in his bed and has sex with her under the mistaken impression that she is not aware of his actions. In the end, both are quite happy. Did Mick commit sexual assault?
2. Polly is in love with Mick. At a party, she pulls him into a bedroom and suggests that she perform a certain sexual act on him. Mick finds the idea repulsive and (in his mind) strongly objects to it; however, he is afraid of losing Polly's companionship, so he pretends to welcome Polly's advances and goes along with her wishes. Did Polly commit sexual assault?
3. Polly hates her long nose. She would love to have a nose job but she is too proud to openly admit that. In fact, she has a secret wish that her fiancé Mick (who is a plastic surgeon) singlehandedly put her under anesthesia and fix her nose. Mick also hates Polly's nose but he is not aware of Polly's inner thoughts. Nevertheless, one day he puts Polly under anesthesia and performs a surgery on her. Outraged by his conduct, his nurse reports him to the authorities. Is Mick guilty of battery?
4. Polly's dentist insists that she have her wisdom teeth removed. Polly disagrees with the dentist believing (quite correctly) that there is no need for the surgery. However, being an obedient young woman, she does not express her objections, and the dentist removes her wisdom teeth. Is the dentist guilty of battery?

These examples are meant to demonstrate the gap between one's internal feelings (welcoming an act by another or at least waiving moral objections to that act) and one's expressive conduct (by words or actions). Clearly the two do not always go hand in hand.

²⁰ Both cases, *People v. Bink* and *People v. Burnham*, were aptly discussed in WESTEN, *supra* note 5, at 139–40.

- In the first example, Polly may be said to have granted Mick attitudinal but not performative consent to sex.
- In the second case, conversely, Mick gave Polly performative consent to sex but (arguably) not attitudinal.
- In the third example, Polly may have granted Mick attitudinal consent to surgery but not performative.
- And finally, in the fourth, Polly may have granted her dentist performative but not attitudinal consent to the oral surgery.

What consent (attitudinal or performative) should lie in the foundation of a legal rule that defines the boundaries of permissive conduct?

Advocates of the attitudinal approach usually argue that criminal law should rely on the subjective acquiescence of the parties.²¹ After all, it is their subjective attitudes that make the whole difference between right and wrong. How can we say that Jack raped Jill when Jill tacitly welcomed their intimacy? These advocates would argue that expression of one's acquiescence is neither sufficient nor necessary for valid consent. For instance, if Jill expressed her willingness to have sex with Jack merely because she felt threatened by him, her consent would be invalid. Thus, expressing consent is not sufficient for making it valid. Similarly, expressing consent is not necessary. Consent, they argue, is like a belief—and a belief may be present or absent regardless of its expression.²² Accordingly, Jack is not guilty of rape regardless of what Jill did—enthusiastically welcomed Jack's advances, passively accepted them, or even desperately fought—as long as she mentally, at a minimum, did not object, freely and voluntarily, to Jack's actions.

The opponents of the attitudinists, the adherents of the performative theory of consent, disagree. In their view, consent is an act, not a belief. It is like "I do" in the exchange of marital vows. For them, consent does not describe the state of events but rather *creates* a new normative reality. Like a promise, it is an illocutionary act that changes the moral meaning of the applicable conduct only by communication. It would be ridiculous to say that Polly agreed to have her nose fixed by Mick by simply having positive thoughts about that surgery. In the same way, it is ridiculous to think that Polly consented to sex with Mick without communicating her acquiescence. As Alan Wertheimer phrased it:

²¹ Alexander, *supra* note 4; Hurd, *supra* note 1.

²² Brett, *supra* note 15, at 80–88 (1998); WERTHEIMER, *supra* note 5, at 144–62.

[T]here is no moral magic to consent that has to be explained. B's consent is morally transformative because it changes A's reasons for action. If we ask what could change A's reasons for action, the answer must be that B performs some token of consent. It is hard to see how B's mental state—by itself—can do the job.²³

It appears, therefore, that the dividing line between the attitudinists and performativists lies in the reasons *why* each group considers consent important. The attitudinists focus on the victim. If the rational and responsible putative victim, B, mentally gave his free and voluntary approval (even without expressing it) to A's act, then B was not wronged. B was not wronged, even if he was objectively harmed, i.e. his interests were set back (say, upon B's request, A destroyed B's valuable stamp collection). And if the putative victim was not wronged, no crime was committed, and the state may not punish the perpetrator for it.²⁴

In contrast, the performativists focus not on the victim but on the perpetrator and his relationship with the state/society. For them, consent is relevant mainly because it changes the perpetrator's reasons for action; i.e. for them, the essence of the crime is not the violation of rights of an individual victim but rather the perpetrator's moral and political transgression. Regardless of the victim's idiosyncratic choices, *we, all of us*, are harmed when the perpetrator acts for a wrong reason. The fact that Jill happened to welcome intimacy with Jack is just a matter of luck and should not change Jack's culpability. He was not aware of Jill's inner thoughts and acted, at a minimum, with reckless disregard for Jill's consent. He is, therefore, subjectively culpable (wrong) and is as dangerous and deserving of punishment as any other perpetrator who was not so atypically lucky with respect to his victim's feelings.

Both models capture some of our important moral intuitions and yet both are flawed. Their flaw, in my view, lies in their absolutist approach to the role of consent in drastically different circumstances. The supporters of both the attitudinal and the performative theories aspire to explain very different moral realities with one overarching model. In contrast, I suggest that we should not be selecting one theory over the other to cover all cases, but instead we should establish a rule that would assign the attitudinal model to one group of cases and the expressive model to the other. Let's look again at the possible combinations of the attitudinal and expressive consent.

Attitudinal Consent	Expressive Consent
present	present

²³ WERTHEIMER, *supra* note 5, at 146.

²⁴ Whether the crime was attempted and whether the state may have reasons to punish inchoate crimes is a separate question.

present	absent
absent	present
absent	absent

The present/present (the victim consented) and the absent/absent (the victim did not consent) scenarios pose little problem, so we should be concerned only about the present/absent and the absent/present paradigms. I suggest that different models of consent should be used depending on whether the role of consent in a particular case is inculpatory or exculpatory.

It is inculpatory if non-consent is an element of an offense; it is exculpatory if consent is a defense.

In the first instance, the perpetrator's act is *prima facie* morally neutral; it becomes criminal due to the attending circumstances (non-consent). Theft, rape, trespass, and kidnapping provide examples of the inculpatory non-consent. Absent the victim's non-consent, there is nothing wrongful or regrettable in the act of taking the property of another or having sex or visiting someone's home. Therefore, from the policy perspective, there is no need to inquire into the actor's motives. From the legal perspective too, the actor's motives for acting in this non-wrongful and non-regrettable fashion are largely irrelevant: the actor may not be convicted of a completed crime in the absence of a required element of the offense (non-consent).²⁵ If I had sent my neighbor an invitation for a tea party but the neighbor forgot to open it yet decided to crash my tea party in order to embarrass me, he would still not be guilty of trespass regardless of his lapse of memory and judgment.

In contrast, when consent plays an exculpatory role, the perpetrator's act is *prima facie* wrongful (there would be no need for exculpation if it were not). Homicide, maiming, and battery are examples of such conduct. Causing death, injury or pain is *prima facie* bad and should be avoided. A *prima facie* bad act may of course lose its wrongful character due to the defense of justification.²⁶ For example, the perpetrator may not be blamed or punished for killing a deadly aggressor if the killing was necessary in order to protect the perpetrator's life or the lives of other innocent people. To be entitled to that defense, the perpetrator (at a minimum) would have to show:

- (1) the basis for the defense (the deadly attack by an unprovoked aggressor),
- (2) a positive balance of harms and evils (innocent lives were saved at the cost of the aggressor's life), and

²⁵ For an excellent discussion of the difference between a definition and a defense, see George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293, 308–21 (1975).

²⁶ See also Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 203 (2007).

- (3) the perpetrator's subjective awareness of the justifying circumstances (the deadly attack and the need to use deadly force in order save innocent lives).

If conditions (1) or (2) were not satisfied due to the perpetrator's mistake (including a reasonable mistake), the perpetrator should not be entitled to justification, even though he may be entitled to an excuse. If condition (3) was not satisfied (i.e. the defendant was not aware of the aggressor's impending attack and attacked him out of sheer hatred), the defendant would not be entitled to any defense whatsoever.²⁷

Why do we have this discrepancy between the knowledge required to defeat a *prima facie* case (none; the case of my party-crashing neighbor) and to plead successfully a defense (self-defense)? Mainly because we view a defense of justification as a limited license to commit an otherwise prohibited act in order to achieve a socially and morally desirable outcome. Justification is invoked when a *prima facie* wrongful act has been committed and the actor seeks to explain it. No surprise, the defense requires "clean hands" and must be deserved whereas a morally neutral act may be done for any reason.²⁸

Applying the same justificatory logic to the defense of consent, we should only grant complete justification to the perpetrator who, in addition to having the true attitudinal consent of the victim (the basis for the defense), also achieved a better balance of harms and evils, and was aware of the victim's consent and motivated by the desire to achieve a better result.

In practical terms, that means that the objective presence of consent (attitudinal consent) precludes even a *prima facie* case of rape or theft, regardless of whether the consensual act brings about more good than harm and regardless of whether the defendant is aware of the victim's consent. However, full knowledge of the justifying circumstances (victim's consent) should be required for a successful defense to the charge of homicide or battery.²⁹ And full knowledge is impossible without the victim's expressive consent. So, Mick in the first sex hypothetical is not guilty of sexual assault (but is most likely guilty of attempted sexual assault). But Mick the plastic surgeon in the first medical scenario is guilty of battery.

What about those cases in which there is no attitudinal consent; however, the expressive consent is present, or at least the perpetrator is reasonably mistaken about the presence of consent? Take, for instance, Mick and Polly in hypotheticals

²⁷ See also Vera Bergelson, *Consent to Harm*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE*, *supra* note 5, at 173-74.

²⁸ George Fletcher raises similar points in his groundbreaking work, *Rethinking Criminal Law*. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 705 (1986).

²⁹ I am not suggesting that consent of the victim is all that should be required for the successful defense. My point is that consent of the victim should be a necessary condition of such a defense.

2 and 4. In hypothetical number 2, Mick gives Polly expressive consent authorizing her to perform a certain sexual act on him although deep inside he strongly objects to that. In hypothetical number 4, Polly externally goes along with her dentist's decision to remove her wisdom teeth although deep inside she disagrees. In both hypotheticals, the objective, attitudinal, consent is lacking, therefore, the perpetrators are not entitled to justification. But is their conduct criminal? Certainly not. Neither the proactive Polly who initiates sex in hypothetical number 2, nor the wisdom-teeth-hating dentist in hypothetical number 4 is guilty of any wrongdoing. Their mistakes were innocent; each of them acted with the prudence of a reasonable person. We may not ask more of an average citizen.

At the same time, we cannot say that the victims (Mick in hypothetical number 2 and Polly in hypothetical number 4) were not wronged—objectionable physical intrusion is certainly a wrong. What we can say, however, is that the perpetrators were not culpable: through no fault of theirs, they lacked the accurate understanding of the situation. They should be entitled to the complete defense of excuse.

CONCLUSION

The proposed rule has the advantage of recognizing that consent should be treated differently depending on whether the act of the perpetrator is *prima facie* wrong or not. The different models of consent are required by the doctrine of criminal harm. Traditionally, criminal harm is defined through wrongful violation of rights. This definition is sometimes interpreted rather simplistically—by looking only at the victim and the victim's rights and interpreting the "wrongful" component as "unauthorized" or "unwarranted." Naturally, such interpretation makes criminalization of consensual killing or hurting problematic: being a waiver of rights, consent defeats any rights violation. However, if we focus not only on the victim but also on the actor, not only on the result but also on the act itself, we will see that criminal law has a strong deontological component. Committing a *prima facie* wrongful act requires an explanation, and the explanation brings in the perpetrator's reason for acting in a harmful way. Thus, wrongfulness of an act is not reducible to a breach of the victim's rights; it also includes a poor reason for action. And when consent defeats the former element of wrongfulness, there still may remain the latter.

Therefore, when the act is *prima facie* morally neutral, we do not need to question the actor's reasons for action, and attitudinal consent is enough to defeat criminal harm. However, when the act is *prima facie* wrong (as in cases of intentional infliction of physical harm), and it requires an explanation (defense), the actor's reasons for action become crucial. To invoke the defense of consent, the perpetrator needs to be aware of the victim's consent. And the only way the perpetrator may be aware of consent is if the victim has expressed it; i.e., for a successful defense of consent, consent must be performative. If it is accompanied

by the attitudinal consent, the actor is justified. Performative consent alone (or its reasonable but mistaken perception) does not give rise to justification but provides the perpetrator who is neither aware of nor culpably mistaken about the victim's attitudinal non-consent with complete excuse.